NO. 43339-7

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MANUEL MERINO, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John A. McCarthy

No. 11-1-02573-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the State have sufficient evidence to uphold the jury's verdict for count II, that the defendant was guilty of unlawful delivery of a controlled substance?

B. STATEMENT OF THE CASE.

1. Procedure

On June 20, 2011, the Pierce County Prosecutor's Office ("State") charged Manuel Merino ("defendant") with two counts of unlawful delivery of a controlled substance. CP 1-2. The State also charged co-defendant, Malcom Hampton, with one count of unlawful delivery of a controlled substance. CP 1-2. On March 16, 2012, the information was amended to include that the defendant was within 1,000 feet of a school bus route stop for both counts. CP 5-6. On March 22, 2012, the information was amended a second time to include that the defendant was within 1,000 feet of the perimeter of school grounds or a school bus route stop on Count III. CP 7-8.

On March 19, 2012, jury trial began for the defendant and his co-defendant before the Honorable John A. McCarthy. 1 RP 1. The jury found the defendant guilty as charged. CP 42; CP 16. The jury also found that the crimes were committed within 1,000 ft of a school bus stop. CP

43-44. The jury acquitted the co-defendant of the one count of unlawful delivery of a controlled substance. 5&6 RP 476.

On April 20, 2012, the court sentenced defendant to a total of 84 months. CP 47-90; 7 RP 8. The court sentenced the defendant to 60 months on both counts to run concurrently, and an additional sentence enhancement of 24 months for both counts to run concurrently. CP 47-60. The defendant filed a timely notice of appeal. CP 61.

2. Facts

In June of 2011, Officer Shultz received information that people were distributing narcotics at a house located at 1008 7th Street Tacoma, Washington. 1&2 RP 26-31. Officer Shultz conducted his own surveillance at various times; he observed people, who looked as if they did not belong, stop by for frequent short visits. 1&2 RP 33. As a result, Officer Shultz decided to pursue an investigation. 1&2 RP 33.

On June 14, 2011, Officer Shultz used a confidential informant, Tamika Foley, to conduct a "cold knock." 1&2 RP 52. A "cold knock" is when a stranger knocks on the door and tries to purchase narcotics from the occupant. 1&2 RP 34. Officer Shultz observed Ms. Foley walk up to the house, knock on the door, and go inside. 1&2 RP 44. Ms. Foley testified that inside the house she met Mr. Hampton who asked Ms. Foley where he knew her from. 3 RP 143. Ms. Foley pretended that they had previously met at the "Handy Mart." 3 RP 142-143. Ms. Foley told Mr.

Hampton that she wanted to purchase drugs; Mr. Hampton went upstairs and returned with the defendant. 3 RP 144. When Mr. Hampton and the defendant approached Ms. Foley, the defendant handed her a phone number, and warned Ms. Foley to not come back to the house without calling first. 3 RP 146. Mr. Hampton then handed Ms. Foley the crack cocaine, and she handed him the $100. 3RP 146-147. After Ms. Foley left the house, she gave the crack cocaine to Officer Shultz and Officer Buchanan. 1&2 RP 47.

On June 20, 2011, Officer Shultz set up another controlled buy and had Ms. Foley call the defendant at the number he had given her to purchase crack cocaine. 1&2 RP 55. Officer Shultz videotaped the transaction, which occurred in the Safeway parking lot located between 11th and 12th near M Street in Tacoma. 1&2 RP 55; Exhibit 3. Ms. Foley testified that she was given $100 to purchase crack cocaine. 3 RP 148-150. Ms. Foley put the money in the defendant's pocket, and the defendant put the drugs in Ms. Foley's hand. 3 RP 148-150. After the June 20, 2011 controlled buy, the officers followed the defendant's vehicle back to the 1008 South 7th Street house. 1 RP 58.

On June 23, 2011, Officer Shultz served a search warrant to allow the search of the 1008 South 7th Street house and vehicles. 1&2 RP 71; 1&2 RP 91. Defendant and Mr. Hampton were present during the search and were subsequently arrested. 1&2 RP 77. The officers discovered evidence of drug paraphernalia, drug pipes, prescription pill bottles,

packaging bottles, and packaging for marijuana. 1&2 RP 78. The officers found a quantity of a little over a $1,000 on the defendant. 1&2 RP 80-81.

The officers also found $300 in the trunk of Mr. Hampton's car. 1&2 RP 80-81.

During trial, Maude Kelleher, lead routing specialist for Tacoma School District, testified that the 1008 7th Street house was located within 1,000 feet of a school bus stop. 3 RP 308. Ms. Kelleher also testified that Whitman Elementary was located within a 1,000 foot radius of the Safeway where the June 20th delivery occurred. 3 RP 313-314.

Robert Lattimar, the person who leases the 1008 7th Street house testified in the defense case. 4 RP 361. Mr. Lattimar explained that the house is a "clean and sober" house that is meant for short term living when people need to get back on their feet in society. 4 RP 362. Mr. Lattimar said that the defendant was a resident advisor of the house and his duties were to keep the house in order and to notify Mr. Lattimar if anything needed to be fixed. 4 RP 366. Mr. Lattimar explained that defendant had about $1,100 on him because he gave defendant approximately $500 to replace a French drain in the basement, and $500 was collected for rent. 4 RP 366.

Mr. Hampton testified that he had never met Ms. Foley, or gave her drugs. 4 RP 376. Mr. Hampton testified that he kept money in his vehicle for rent. 4 RP 376.

Defendant did not testify.

C. ARGUMENT.

1. THE STATE HAD SUFFICIENT EVIDENCE TO PROVE COUNT II, THAT DEFENDANT COMMITTED THE CRIME OF UNLAWFUL DELIVERY OF A CONTROLLED SUBSTANCE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. ***State v. Thomas***, 166 Wn.2d 380, 390, 208 P.3d 1107 (2009). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational fact finder could have found the elements of the crime beyond a reasonable doubt. ***State v. Marohl***, 170 Wn.2d 691, 698, 246 P.3d 177 (2010). Challenging the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from the evidence. ***State v. Gerber***, 28 Wn. App. 214, 217, 622 P.2d 888 (1981), ***State v. Theroff***, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). All reasonable inferences from the evidence must favor the State and must be interpreted most strongly against the defendant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Both circumstantial and direct evidence are equally reliable. ***State v. Lubers***, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996). In the case of conflicting evidence or evidence where reasonable minds might differ, the jury is the one to weigh the evidence, determine credibility of witnesses and decide disputed questions of fact. ***Theroff***, supra, at 593. Credibility determinations are for the trier of fact and not subject to review. ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In Washington, an accomplice is a participant in a crime, but need not participate in or have specific knowledge of every element of the crime nor share the same mental state as the principal. ***State v. Sweet***, 138 Wn.2d 466, 479, 980 P.2d 1223 (1999); ***State v. Hoffman***, 116 Wn.2d 51, 104, 804 P.2d 577 (1991). The accomplice must have acted with knowledge that his or her conduct would promote or facilitate "the crime" for which he or she is eventually charged, and that knowledge of "'a crime' does not impose strict liability for any and all offenses that follow." ***State v. Cronin***, 142 Wn.2d 568, 579, 14 P.3d 752 (2000); ***State v. Roberts***, 142 Wn.2d 471, 513, 14 P.3d 713 (2000). Courts have upheld accomplice liability instructions where the evidence supports an inference that the defendant was either the principal or an accomplice, even if the prosecution primarily argued principal liability. ***State v. Munden***, 81 Wn. App. 192, 913 P.2d 421 (1996) (when the evidence did not exclude the

possibility that defendant acted both as principal and accomplice, the trial court did not err in instructing on accomplice liability); *see also* ***State v. McDonald***, 138 Wn.2d 680, 689, 981 P.2d 443 (1999).

Additionally, a person legally accountable for the conduct of another person may be convicted on proof of the commission of the crime and of his complicity therein, although the person claimed to have committed the crime has been acquitted. ***State v. Harris***, 106 Wn.2d 784, 791, 725 P.2d 975 (1986), *citing* RCW 9A.08.020.

To convict the defendant of the crime of unlawful delivery of a controlled substance, the State had to prove:

> (1) That on or about the 14th of June, 2011, the defendant or an accomplice delivered a controlled substance;
> (2) That the defendant knew that the substance delivered was; cocaine; and
> (3) That this act occurred in the State of Washington.

CP 19-41 Instruction No. 12; *see also* RCW 69.50.401(1)(2)(a).

Defendant only challenges the first element of the unlawful delivery that occurred on June 14, 2011, at the 1008 7th Street house. Brief of Appellant 9. Defendant does not challenge that he knew that the substance delivered was cocaine, or that this act occurred in the State of Washington. Brief of Appellant 9-10. Defendant also does not challenge

the second controlled buy that occurred on June 20, 2011. Brief of Appellant 9.

The State had sufficient evidence to prove that on June 14, 2011, the defendant, was acting as an accomplice to the person who delivered the cocaine Ms. Foley. A reasonable juror could infer that the defendant was in charge of the drug transaction that occurred at 1008 South 7th Street house.

On June 14, 2011, when Ms. Foley "cold knocked" at the 1008 South 7th Street house, she initially spoke with Mr. Hampton telling him that she wanted drugs. Mr. Hampton did not make the sale without first bringing the defendant to meet Ms. Foley. A reasonable inference is that Mr. Hampton did not make the drug sale immediately because he went to get the defendant's permission prior to engaging in the drug deal. The defendant acknowledged Ms. Foley, warned her to not come to the house without calling first, and gave her a phone number to call if she wanted any drugs in the future. A reasonable juror could make the inference from these facts that the defendant was supervising the drug deal, and setting up the conditions for any further drug transactions with Ms. Foley. It was only after the defendant interacted with Ms. Foley did Mr. Hampton engage in the exchange of drugs and money. A reasonable inference is that Mr. Hampton was acting in accordance with defendant's approval in

selling to with Ms. Foley, rather than his own desire to complete the sale. This conclusion is strengthened by the fact that Ms. Foley's second purchase of drugs was from the defendant alone. This leads to the conclusion that defendant was the primary drug dealer and that Mr. Hampton followed his directions. This evidence clearly indicates that the defendant facilitated, or promoted the delivering of the cocaine.

Defendant cites to ***Rangel-Reyes*** and ***Hernandez*** arguing that there was more evidence presented in these cases than in the present case. ***State v. Rangel-Reyes,*** 119 Wn. App. 494, 81 P.3d 157 (2003), ***State v. Hernandez***, 85 Wn. App. 672, 935 P.2d 623 (1997). However, ***Rangel-Reyes*** and ***Hernandez*** supports the State's position in the present case because in both cases, the court reiterated that circumstantial evidence was sufficient to convict the defendants of the crime of unlawful delivery of a controlled substance.

In ***Rangel-Reyes,*** the defendant challenged whether the evidence was sufficient to prove that the defendant was more than merely present during a drug deal. ***Rangel-Reyes***, 119 Wn. App. at 496. The police had an informant call Mr. Garcia to set up a controlled buy at a parking lot. *Id.* The informant testified that while he was waiting in the parking lot with Mr. Garcia, he had to wait for the defendant to bring the cocaine. *Id.* When the defendant showed up in the parking lot, the informant could

hear a portion of a discussion regarding the price of the cocaine that went on between Mr. Garcia and the defendant. *Id.* The court held that there was sufficient evidence because the circumstantial evidence was substantial to show that the defendant was not only the cocaine supplier, but he knowingly facilitated the transaction. *Id.* at 500.

In ***Hernandez***, on a consolidated appeal, four defendants challenged the sufficiency to whether or not the evidence was sufficient to establish that the object delivered was a controlled substance. ***State v. Hernandez***, 85 Wn. App. at 674. During each case, officers used binoculars to watch a drug deal. *Id.* at 674. In each case, the customer and merchandise was gone by the time the officers arrested the defendant, but the officers found a similar substance on the defendant as the item delivered. *Id.* at 674. The court found that there was sufficient evidence in each case because of the inferences, and the officers' experiences with drug dealing to determine that the transactions involved controlled substances. ***Hernandez***, 85 Wn. App. 678-682.

Defendant argues that the evidence was insufficient in this case because Ms. Foley did not overhear a discussion between Mr. Hampton and the defendant, see the defendant hand the drugs to Mr. Hampton, or see the defendant take the money from Mr. Hampton. Nevertheless, just as in ***Rangel-Reyes*** and ***Hernandez***, the circumstantial evidence is

substantial to show that the defendant was an active participant during the drug transaction. In addition, ***Hernandez*** is factually distinguishable from the present case because the defendants were challenging whether the substance was in fact a controlled substance. In the present case, the defendant is not challenging this element, and it has been established that the substance was in fact cocaine.

A reasonable juror could have concluded based on the evidence that the defendant was aiding Mr. Hampton during the first controlled by on June 14, 2011. Therefore, based on all of the evidence the State provided, any rational trier of fact could have found beyond a reasonable doubt that on June 14, 2011, the defendant delivered a controlled substance.

D. CONCLUSION.

The State respectfully requests the court to affirm defendant's exceptional sentence and order a correcting judgment.

DATED: October 24, 2012

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Rule 9

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The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/24/12
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